In the United States Court of Appeals
for the Ninth Circuit

No. 15533

BUILDERS CORPORATION OF AMERICA, a Corporation, and HERLONG SIERRA HOMES, INC., a Corporation,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the United States District Court for the Northern District of California
Northern Division

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act in the United States District Court for the Northern District of California to recover damages for alleged loss of rental income from dwelling units constructed and owned by appellants adjacent to the Sierra Ordnance Depot in Lassen County, California. The United States moved to dismiss the complaint for failure to state a claim, and for want of jurisdiction under the Tort Claims Act. This appeal

is from an order of the district court dismissing the complaint on the government's motion.

The factual allegations of the complaint may be summarized as follows:

The United States owns and operates the Sierra Ordnance Depot located in an isolated part of Lassen County, California (R. 3-4). When housing facilities for military and civilian personnel stationed at the depot were found to be inadequate in July 1950 (R. 8-9), the "Department of Defense entered into negotiations with the Federal Housing Administration (FHA) and the Housing and Home Finance Agency (HHFA) to obtain [private] construction of four hundred fifty-six (456) dwelling units" to be used to house personnel at the depot (R. 9-11). In October, 1951, the FHA pursuant to Title VIII of the National Housing Act (12 U.S.C. 1748b), upon certification by the Department of the Army of a need for housing facilities in the depot area, agreed to insure mortgage loans on 125 dwelling units to be constructed and operated by appellant Herlong Sierra Homes, Inc. for its own account (R. 11-13). These units were completed by Herlong and ready for occupancy in January 1954 (R. 13). The FHA also undertook to insure mortgage loans on 150 dwelling units constructed by appellant Builders Corporation of America for its own account, which were ready for occupancy in August 1954 (R. 14-15). The complaint further alleges that in January 1954 the Commanding General of the Sixth Army directed the depot commander to take certain affirmative steps to

ensure occupancy of appellants' housing by base personnel (R. 15-16).

As grounds for relief, Count I of the complaint asserts (1) that the depot commander and other named subordinate officers "with the intention of damaging plaintiffs, deliberately, intentionally, and wilfully failed and refused to carry out the orders issued" by the commanding general to ensure occupancy of the housing (R. 18); and (2) that the named officers, for the purpose of preventing occupancy of appellants' housing by depot personnel, deliberately misrepresented the quality of the construction of the housing to the commanding general, the FHA and the HHFA, and to the military and civilian personnel stationed at the depot, thereby preventing occupancy of the housing by depot personnel (R. 19-21).

In Count II of the complaint, appellants asserted, alternatively, (1) that the named officers negligently failed to carry out the commanding general's orders to take steps to ensure full occupancy of appellants' housing (R. 22-23); and (2) that the named officers negligently misrepresented the quality of construction of the housing to the commanding general, the FHA and HHFA, and to the depot personnel, thereby preventing occupancy of the housing (R. 23-25).

The district court, after hearing argument on the government's motion to dismiss, dismissed Count I of the complaint for lack of jurisdiction under the Federal Tort Claims Act, and Count II for failure to state a claim on which relief could be granted (R. 36-37).

STATUTE INVOLVED

The Federal Tort Claims Act (Title 28, U.S.C.) insofar as pertinent, provides:

Section 1346

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

SUMARY OF ARGUMENT

I

A. The Federal Tort Claims Act does not extend to recovery based on the tort of interference with contractual relations. The present complaint seeks

recovery of lost rental profits based on two counts of alleged wilful or negligent interference by government officers with appellants' prospective tenancies. Under both California and general law, interference with a prospective economic benefit or advantage is merely an element of the tort of interference with contractual relations. Hence, Count I of the complaint for wilful interference is barred under the Tort Claims Act. Insofar as Count II of the complaint (for negligence) states a claim at all, it must also be grounded on interference with prospective economic advantage, and is therefore barred under the Tort Claims Act.

B. The complaint, in alleging wilful or negligent misrepresentations on the part of government officers as to the suitability of appellants' dwelling units, presents a claim founded on misrepresentation, a tort which is expressly excluded from the waiver of immunity in the Tort Claims Act. This Court has held in *Clark* v. *United States*, 218 F. 2d 446 that the exclusion for misrepresentation applies both to negligent and wilful misrepresentation. No claim can be founded on the complaint's other allegations of failure by government officers to take affirmative action to ensure occupancy of appellants' property, since no duty on the part of the United States to act is alleged.

It follows that the entire complaint, to the extent that it states a claim, is grounded on misrepresentation and could have been dismissed for lack of jurisdiction on this ground.

II

The district court correctly dismissed Count II of the complaint, based on negligence, for failure to state a claim upon which relief could be granted. This count, although alleging negligent action and inaction on the part of the government officers and resulting damage to appellants, fails to allege any duty on the part of the United States to appellants, based on law or contract, to act or refrain from action in connection with the lease of appellants' housing. It is of course settled that no recovery can be had for negligence in the absence of a duty to the plaintiff.

ARGUMENT

The Federal Tort Claims Act (*supra*, p. 4) authorizes suit against the United States for the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." The waiver of sovereign immunity for tort liability is specifically conditioned, however, by exclusion of the following types of claims (28 U.S.C. 2680(h), *supra*, p. 4):

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

We show in the following pages that the court below correctly dismissed Count I of the complaint on the ground that it was based on the excluded tort of "interference with contract rights", and that it prop-

erly dismissed Count II because of appellants' failure to allege a breach of a duty owed to them by the Government. We shall also show that the entire complaint could properly have been dismissed on jurisdictional grounds.

I

The Entire Complaint Could Have Been Dismissed On Jurisdictional Grounds.

A. *Since Both Counts of the Complaint Sought Recovery for "Breach of Contract Rights", the District Court had no Jurisdiction to Entertain Either Count Under the Tort Claims Act.*

1. Count I of the complaint (R. 18-21) claimed in substance that government officers deliberately and intentionally misrepresented the structural conditions and general suitability of appellants' dwelling units to their superiors, as well as to depot personnel who were potential occupants of the facilities, thereby persuading personnel not to lease the facilities with resulting loss to appellants. In addition, Count I alleged that the same officers deliberately failed to take certain affirmative steps which would ensure occupancy by depot personnel. These allegations, as the court below recognized (R. 29-30), insofar as they stated a claim at all, amounted to a claim of interference with contractual relations under California law. Under the law of that State, which is controlling here,[1] the tort of interference with con-

[1] State law (in this case the law of California, the State in which the alleged negligent or wrongful acts and the damage occurred) governs the substantive right of recovery under the Tort Claims Act, 28 U.S.C. 1346 (b); cf. *Massachusetts Bonding Co.* v. *United States,* 352 U.S. 128.

tractual relations encompasses interference with prospective as well as existing business relationships. *Masoni* v. *Board of Trade*, 119 Cal. App. 2d 738, 260 P. 2d 205; *Campbell* v. *Rayburn*, 129 Cal. App. 2d 232, 276 P. 2d 671; *Guillary* v. *Godfrey*, 134 Cal. App. 2d 628, 286 P. 2d 474.

As we have noted, the gravamen of Count I of the complaint is that appellants were intentionally and wrongfully deprived of rental profits which they would have obtained from prospective tenants, had not those tenants been dissuaded from leasing appellants' properties as a result of action or inaction by government officers. Since the tort of interference with contractual relations under California law "is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another," *Masoni* v. *Board of Trade*, *supra*, at p. 741, the Tort Claims Act provides no jurisdiction over Count I.

Even apart from California law, it is evident that Congress did not intend to permit suits against the United States for damages arising from what Dean Prosser has termed the tort of "interference with prospective advantage" (Prosser, *Torts*, 2d Ed., pp. 745-748). As the court below observed (R. 29):

> It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, waive the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree,

only, in the elements necessary to establish liability.

This conclusion is strengthened by the fact that interferences with merely prospective rights are held actionable only by analogy to interference with existing contracts, and a defendant is accorded a much more extensive privilege to interfere with a mere expectation of benefit than with an existing contract right. Prosser, *Torts*, 2d Ed., pp. 745-748. It is highly unlikely therefore that Congress would have intended to exclude suits based on interference with existing contracts but to allow recovery based on mere expectation of benefit.[2]

2. Count II of the complaint, which restates the allegations of Count I but characterizes the conduct in each instance as negligent rather than wilful or deliberate, is jurisdictionally defective for the same reasons.

Although "interference with contractual relations" is primarily an intentional tort, in certain cases damages can be recovered for negligent rather than an intentional interference with contract rights. Prosser, *Torts*, 2d Ed., pp. 732-735. It follows that insofar as Count II states a claim at all, it is based

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[2] Appellants' argument (Br. 22-23) that their claim was based on something more than interference with prospective contract relations breaks down under analysis. The damage alleged in their complaint is ascribed solely to the failure of depot personnel to lease their property; from this failure, all of the allegedly consequent damages flowed. The sole reason alleged as to why appellants' property was not occupied is the wilful or negligent action and inaction on the part of government officers in interfering with, or failing to further, the prospective tenancies.

on the tort of interference with contract rights which is barred under the Tort Claims Act.

Furthermore, courts have refused in many cases to allow any recovery at all for negligent interference with contractual relations. Prosser, *supra*, p. 732. Application of such a rule here would mean that Count II fails to state a claim upon which relief could be granted. Either way, there can be no recovery under Count II. See Pt. II, *infra*.

It follows that Count II could have been dismissed on the ground that it presented a claim for interference with contractual relations, a claim on which the United States has not consented to suit, as well as on the basis actually chosen by the district court, that it failed to state a claim upon which relief could be granted.[3]

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[3] It appears clear that the first count could also have been dismissed for failure to state a claim. While the complaint alleges an interference with prospective economic advantage which is a *prima facie* basis for recovery, it is well established that an employer, acting in good faith to protect his employees' interests, is privileged to dissuade them from entering contractual arrangements, and that any damage caused to third parties is *damnum absque iniuria*. Prosser, *Torts*, 2d Ed., p. 736. Since Count I, as we read it, does not allege malice or bad faith on the part of the depot officers but only a deliberate intent to prevent occupancy of appellants' property, the advice given to the depot employees was privileged and could not give rise to a right of action against the United States.

It also seems clear that the appellants could not complain of the depot officers' allegedly deliberate failure to take affirmative steps to ensure occupancy of appellants' housing, since the officers were under no duty, by contract or otherwise, to further appellants' enterprises. See Pt. II, *infra*, pp. 11-16.

B. *Misrepresentation by Government Officers as to the Suitability of Appellants' Housing for Occupancy, Whether Wilful or Negligent, is an Essential Allegation of Both Counts of the Complaint. Hence, the Complaint was Barred by the Tort Claims Act's Express Prohibition Against Recovery for Misrepresentation.*

The gist of both Counts I and II of the complaint was the claim that the depot officers had injured appellants by wilfully or negligently misrepresenting the condition of appellants' dwelling units to depot personnel, thus persuading them not to occupy the units.[4]

The Tort Claims Act (*supra*, p. 4) expressly excludes from its coverage the torts of deceit (wilful or fraudulent misrepresentation) and misrepresentation. This Court in *Clark v. United States*, 218 F. 2d 446, has held that the exception applies to recovery for any wilful or negligent misrepresentation. See, for the same holding, *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 967; *Miller Harness* v. *United States*, 241 F. 2d 781 (C.A. 2); *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967. Since both counts of the complaint are founded on a claim that appellants were damaged by misrepresentations, either wilful or negligent, both counts

[4] It is true that both counts also allege a failure on the part of the depot officers to take affirmative steps to ensure occupancy of appellants' housing. Since, however, the complaint does not evidence any duty on the part of these officers to take affirmative steps to further appellants' business, the complaint must stand or fall on its allegations of misrepresentation. (See, *supra*, p. 10 and Pt. II, *infra*, pp. 11-16.)

were also subject to dismissal on this ground. *Anglo-American and Overseas Corp.* v. *United States*, 144 F. Supp. 635, 637 (S.D.N.Y.).

II

Count II of the Complaint Was Properly Dismissed For Failure To State A Claim Upon Which Relief Could Be Granted.

The district court dismissed the second count of the complaint on the ground that the complaint does not allege the breach of a duty owed to appellants, stating *inter alia:*

> In order to recover damages on their second cause of action, based on negligence, it is essential that plaintiffs allege and prove that defendant owed them a duty to conform to a standard of conduct which would prevent the kind of injury which plaintiffs allegedly suffered. This is the rule in California (Routh vs. Quinn, 20 Cal. 2d 488), and is likewise applicable to actions based on negligence under the Federal Tort Claims Act * * *
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> * * * *
>
> Plaintiffs' contentions in this regard are based essentially on a theory that Congress, by enacting laws designed to encourage the construction by private businesses of dwelling facilities near military installations, intended to create a duty on the part of the commanding officers of such installations to provide the owners of such housing facilities with tenants so that their investment would be a profitable one. However, an analysis of the statutory provisions (12 U.S.C.A., §§ 1748, et seq.), and their legislative history

(House Report No. 854, 81st Congress, 1st Session, June 20, 1949) yields a different conclusion. * * *

It is of course a familiar tort principle that in order to recover for negligence a plaintiff must show a duty of due care owed to him, and a breach of that duty by the defendant. Prosser, *Torts*, 2d Ed., pp. 167-168; *The Dalles City* v. *River Terminal Co.*, 226 F. 2d 109 (C.A. 9). The complaint here at most alleges a breach of a duty owed by the depot officers to their superiors. No contract or agreement placing a duty on the Government to supply appellants with tenants is alleged. On their face, the statutes authorizing insurance of mortgages on privately owned housing upon certification by the Secretary of the Army of a need for such housing (12 U.S.C. 1748b; 12 U.S.C. 1750b) do not obligate any government agency or officer to assist or protect the business interests of a private builder or lessor beyond the express provisions for mortgage insurance. As the allegations of the complaint indicate (R. 11-16), the only contract or understanding between appellants and the Government was the agreement of the FHA to insure private mortgages on construction loans obtained by appellants, and no other commitments as to occupancy of appellants' housing or as to the profits to be derived by appellants were made by the Government.[5] Thus, while appellants undoubtedly an-

[5] The House Committee Report on the bill adding Title VIII to the National Housing Act (H. Rep. No. 854, 81st Cong., 1st Sess., p. 4) states:

Normally the housing units needed at each [military]

ticipated that their property would be profitably occupied by depot personnel, the United States was under no duty to take affirmative steps to ensure that this would happen and equally had no duty to avoid any lawful action which might prevent its happening. See, *e.g.*, *Woolridge Manufacturing Co.* v. *United States*, 235 F. 2d 513 (C.A.D.C.); Mid-Central *Fish Co.* v. *United States*, 112 F. Supp. 792 (W.D. Mo.), affirmed, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967; *Social Security Administration Baltimore F.C.U.* v. *United States*, 138 F. Supp. 639 (D. Md.); *Anglo-American and Overseas Corp.* v. *United States*, 144 F. Supp. 635 (S.D.N.Y.). As the district court recognized (R. 33-34):

> * * * Of basic concern to Congress was the critical need for adequate housing and living facilities around vital defense installations and the possibility of serious consequences to per-

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installation would be supplied through the construction of public quarters by the military forces. However, meeting this present need in its entirety through the use of public funds would require a tremendous direct expenditure by the Federal Government. It is therefore extremely important that private builders be encouraged to construct as much of this housing as possible.

The bill is designed to encourage them to construct such housing. Where housing is constructed with mortgage insurance under the bill, no cost to the Government would be involved unless, through deactivation or curtailment of military installations or other causes there are losses in excess of the premium and other payments by the mortgagee to the insurance fund. In any event, such losses would not approach the cost of construction by the Federal Government.

sonnel morale arising from undesirable living conditions. To implement the program designed to alleviate this situation, Congress determined that the desired results could best be obtained by the encouragement of the private construction industry to undertake the building projects. Such an undertaking for the Federal Government, it was decided, would be too costly and otherwise unfeasible. Government intervention was, hence, limited to assisting the private construction industry in obtaining the necessary financing by insuring their indebtednesses through the Federal Housing Administration. No duty, however, was placed on the Government to insure the financial success of the private projects; to the contrary, Congress acknowledged a duty only in developing the defense effort to its fullest potential, and recognized that the morale of defense personnel was an indispensable factor in bringing about the success of the program.

By the same token, purported negligence of depot officers in failing to carry out orders, allegedly received from their superiors, to ensure that appellants obtained tenants for their housing, constituted a breach of a duty, if any, only to those superiors or to the employees themselves, not to appellants. Appellants can recover for the officers' purported negligence only by showing a breach of some duty which the officers owed to them. However, a duty to a private person on the part of a government officer in his official capacity must arise either from law or express agreement. We have seen and the complaint demonstrates that the Government at no time obligated itself to ensure the success of appellants' real estate

venture. Under the Tort Claims Act, a duty on the part of an officer for which the Government could be held responsible would have to flow from some government obligation, and none is alleged here.

A failure by government personnel to exercise due care with respect to a duty owed one person does not give a third party to whom no duty is owed the right to recover. "Negligence in the air, so to speak will not do." Pollock, *Law of Torts*, 13th Ed., p. 468; see Prosser, *Torts*, 2d Ed., pp. 166-168.

Thus, although Count II of the complaint was also subject to dismissal on jurisdictional grounds, the district court properly dismissed the count for failure to state a claim.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be affirmed.

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